IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1565 OF 2005
IN
EXECUTION APPLICATION NO.357 OF 2005
IN
SUMMARY SUIT NO.3659 OF 2003

Subhodh K. Shetye ....Plaintiff
V/s.
Prabhakar Mehta ....Defendant

Mr.Sanjay Jain i/b Mr.P.P. Kulkarni for the Plaintiff.
Mr.F.E. DeVitre, Senior Counsel i/b M/s.Maneksha & Sethna for the Defendant.

CORAM : S.J. VAZIFDAR, J.
DATED : 7TH FEBRUARY, 2006.

P.C. :-

1. The Chamber Summons has been taken out by the Defendant for a declaration that an ex-parte decree dated 20.9.2004 is null and void as having been passed without jurisdiction and for an order setting aside the warrant of attachment issued in execution of the said decree.

2. Mr. DeVitre, the learned Senior Counsel appearing on behalf of the Defendant submitted that a part of the cause of action has arisen outside Bombay. The Plaintiff having failed to obtain leave under clause XII of the Letters Patent, this Court has no

jurisdiction to entertain and try the suit.

3. The suit is filed as a Summary Suit to recover a sum of Rs.8,28,196=57 ps. together with interest at the rate of 18% p.a. on the principal sum of Rs.5,04,284/- in respect of the goods sold and delivered by the Plaintiff to the Defendant. Paragraph 11 of the plaint reads as under :-

> "11. The Plaintiff states that consignment was exported from Mumbai. Contract was made in Mumbai. The payment to Plaintiff was made at Mumbai. Hence, this Hon'ble court has jurisdiction to entertain and try the present suit."

4. Mr.DeVitre submitted that Exhibit "A" to the plaint which is a sale contract dated 1.2.2002 shows the Defendant's address at B, Alhambra, outside the jurisdiction of this Court. He however relied upon the payment clause which reads as under :-

> "100% at sight against shipping document at Bank of America - A/c. - 0310102703."

5. He then relied upon paragraph 3 of the plaint where it is averred that the said goods were delivered at the Defendant's address in Alhambra. Mr.DeVitre

therefore submitted that the performance of contract which constitutes a part of cause of action was outside the jurisdiction of this Court.

6. The Defendant not having entered appearance, an ex-parte decree was passed. It is important to note that ultimately the sale was concluded on the terms and conditions contained in the invoice (Exhibit "B" to the plaint). The term for payment in sale contract was substituted by a term in the invoice which provided for payment in the Plaintiff's account with the Bank of Maharashtra in Mumbai. In any event, the averment in the plaint is that the payment was to be made at Mumbai.

7. Mr.DeVitre then submitted that the statement in paragraph 11 of the plaint that the consignment was exported from Mumbai is ex-facie false. He based his submission on the fact that in the invoice Cochin is stated to be the Port of Loading. This by itself does not belie the averment in the plaint that the consignment was exported from Mumbai. The instructions for the same could have been given from Mumbai. The goods may will have been initially sent from Bombay. These are questions of fact which cannot be reagitated in execution proceedings.

8. Mr.DeVitre also submitted that the documents tendered by the Plaintiff on the basis of which the ex-parte decree was passed, belie the statement that the consignment was exported from Mumbai. He may well be correct. In fact I suspect that if the question is to be decided on merits the Plaintiff would be hard put to overcome this difficulty. It is however not permissible for me while considering a matter in execution to in effect reopen questions of facts stated in the plaint on the basis whereof the decree was passed.

9. In this view of the matter, it is also not necessary for me to consider Mr.Jain's submission that in any event, the Plaintiff resides in Mumbai and that the same is stated in the title to the plaint. I may only mention that Mr.DeVitre relying upon the judgments of the Allahabad High Court in the case of - *Mahboob Ullah v. Jwala Prasad Kajriwal & Another, AIR 1974, Allahabad, 413,* and of the Calcutta High Court in the case of - *Bepin Behary Law v. Mohit Kumar Pal and others, AIR (29) 1942 Calcutta 496*, submitted that the title is not a part of the plaint.

10. In the circumstances, the Chamber Summons is

dismissed. Needless to add that this order does not affect the rights and contentions of the Defendant in the pending Notice of Motion No.3739 of 2005. The statement made on 21.12.2005 to continue till 3.4.2006. This stay is being granted in view of the statement made on behalf of the Defendant that till then the Defendant will not sell, alienate, dispose of or otherwise encumber the flat at 32-B, Malmoon Apartment, Palkhigulli, Prabhadevi, Mumbai-25.